FILE COPY

Supreme Court, U. S.
FILED
JAN 31 1941
CHARLES ELMORE CROPLEY
CLERK

No. 274.

IN THE

Supreme Court of the United States

October Term, 1940.

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:

HERBERT H. MAASS,
DAVID J. LEVY,
of New York, N. Y.

MELVILLE F. WESTON,
of Boston, Mass.

January, 1941.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Argument:

I—The respondent's argument for taxation of so-called "income rights", as distinguished from income *per se*, is neither consistent with nor capable of sustaining the Regulation 1

II—The test of "accessibility" or "availability" is both fallacious and unsupported by the statute.. 8

III—The Regulation is not needed to prevent "tax avoidance", for the statute, in the light of practical considerations, is adequate to this end.... 10

IV—Incongruities inherent in the regulation and in the respondent's argument in its defense demonstrate its lack of foundation in the statute; similar suggestions of the respondent are without merit 13

Conclusion 17

CITATIONS:

Cases:

Andrus, Matter of, 169 Misc. (N. Y.) 740..... 9*n*

Estate of William J. Morris, Deceased, B. T. A. Docket No. 100,851 (submitted but not decided)..... 15*n*

Lynch v. *Hornby*, 247 U. S. 339..... 16

Statutes:

Int. Rev. Code §827(a) 9*n*

IN THE

Supreme Court of the United States

October Term, 1940.

No. 274.

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

I. The respondent's argument for taxation of so-called "income rights", as distinguished from income *per se*, is neither consistent with nor capable of sustaining the Regulation.

The foundation of the respondent's argument is that what is being taxed is the so-called "income rights", which it is claimed *do* exist at death, as distinguished from the respective items of rents, dividends and interest, *per se*, which it is admitted *do not* so exist, but which are collected during the optional year (Res. Br. 4). Having admitted that the items of income cannot themselves be included, he asserts that they measure the value of pre-existing "income

rights", which are said to be "disposed of" when the income is collected (Res. Br. 5). Thus, by the back door,—so to speak—he draws the income itself into the taxable estate. We will show that the supposed distinction is baseless (a) because what was taxed in this very case was the rents, dividends and interest *per se*, and not any so-called "income rights"; (b) because it is utterly inconsistent with the very terms of the Regulation, as well as the practice of the Bureau of Internal Revenue in its application and enforcement; and (c) because it is artificial and based rather in nebulous theory than in any reality, and is in any event incapable of sustaining the Regulation.

The Regulation purports throughout its length to require the inclusion in the gross estate of the specific items of the interim income, as collected, *per se*, and not the inclusion of the value of alleged "income rights", measured by the amount of net income collected (Pet. Br. 46-48).

Similarly, the record in this case clearly shows that the issue is the propriety of the Commissioner's inclusion in the gross estate of the interest, rents and dividends, as such; and the "Question Presented" in the petitioner's brief was thus properly stated (Pet. Br. 2).

The claim for refund asserted that the Commissioner had included in the gross estate "the amount of income collected or otherwise accrued or realized * * * between the date of death and the valuation date" (R. 9). The Commissioner's letter disallowing the claim held to be proper "the inclusion of dividends and interest that had accrued to the optional valuation dates" (R. 11-12). The complaint alleged that the Commissioner had wrongfully included in the gross estate moneys which "represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death of said decedent" (R. 5).

This averment the answer did not deny, but even affirmatively alleged (R. 13-14), and it must be deemed admitted.

The case was heard and disposed of on the pleadings (R. 15-17), and it was certainly the clear import of the pleadings that what the Commissioner included in the gross estate was in fact the specific items of income of the year following the date of death. As the Government in its brief (pp. 5, 15) admits that "petitioner is clearly correct in his contention that income received by the estate during the year after death, which plainly did not belong to the decedent at the time of his death, is not to be included in the gross estate for purposes of optional valuation", the record requires judgment in the petitioner's favor.

This is the reason why the respondent, in order to lay the foundation for the extended rationalization of the Regulation, finds it necessary to state the issue in a form inconsistent with the specific terms of the Regulation, with the literal meaning of the record, and even with the statement of the question as presented in the respondent's own brief in opposition to certiorari (p. 2). The respondent *now* states the question to be whether, in view of the optional valuation provision, "rights to interest, rent and dividends owned by a decedent at the date of his death are property of the estate within the meaning of this section" (Res. Br. 2).

Even this statement, however, does not accurately forecast the argument to be presented, though it appears to have been carefully phrased to prejustify that argument. The question is not whether rights owned by a decedent at the date of death are part of the property of his estate at death. That is hardly even a question. The issue to which the respondent's lengthy argument is actually addressed is whether, when interest, rent and dividends are col-

lected by executors, there occurs a "disposition" of any "property" which the decedent owned, within the meaning of those words as used in the statute.

We shall now assume, therefore, for purposes of argument, that the record may be construed as saying that the Commissioner included in the gross estate, not the income as such, but a certain sum in dollars which sum was equal to the income received in the year after death and was included because it was equal to that income.

The Commissioner has included this money in the gross estate because, it is now said, at the time of the collection of the interest, rents and dividends certain rights were "disposed of" by the executor, and the interest, rents and dividends were the measure of the value of the rights so disposed of (Res. Br. 5). The respondent thus places his whole case squarely upon that portion of the optional valuation statute which reads:

> "Property included in the gross estate on the date of death and, within one year after the decedent's death, * * * sold, exchanged or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death."

To meet the Government upon its own ground, it is therefore necessary to embark upon some discussion of the meaning of "property" and of "disposition". But before we do so, we wish to emphasize that we have never deemed such a discussion to be necessary to the decision of this case. We have said that the natural and simple meaning of the statute to the ordinary man, the legislative history of

the statute, the absence of any express words calling for the inclusion of sums equal to the income although such words could easily have been inserted, the use by the Congressional Committee of an illustration in which no such sums were included, the fact that the inclusion of such sums diminishes by so much the relief plainly intended, and in addition brings in its train numerous difficulties and incongruities, and finally those rules for the construction of statutes to which this Court has frequently adverted, to all of which we have referred in our brief—we have said that all these considerations required that the statute be given its plain common sense meaning, as both laymen and lawyers, at least prior to the Regulation, would have thought inevitable; and we would not have supposed that it would be material, or consonant with the spirit of recent decisions of this Court; to oppose to these considerations a refined and elaborate discussion of the fragments into which, upon close analysis, the concept of property can be broken.

We rely as strongly as ever upon the considerations summarized above, but we shall proceed to show that the Government's position, upon the ground of its own selection, remains untenable.

The respondent concedes that the general right of the decedent "as against the whole world, to enjoy whatever income his efforts may produce from the property which he owns" (Res. Br. 54), affords no foundation for drawing into the gross estate the results of what his executors may do to develop that right. If a man dies owning money or land, and his executor, under powers given in the will, lends the money, rents the land or buys shares of stock, the Government, as we understand it, concedes that when those arrangements result in the receipt of interest, rents or dividends during the year following death, these sums will not be the measure of anything includible in the gross estate (Res. Br. 53).

However, the Government contends that if at the time of the decedent's death, arrangements to develop the productivity of the property have already been entered into, *i. e.*, the money has been lent and a note or bond received, the land has been leased, or the investment in corporate stock has been made, the right to future income inherent in those arrangements constitutes "property" within the meaning of the statute, and that this "property" is "disposed of" within the meaning of the statute when interest, rents and dividends eventually become due and are collected (Res. Br. 15-16, 18-19, 19-42).

We believe this contention to be fallacious. In real substance, what is disposed of when the income is collected is not the general right which existed at the date of death, namely a right to all future income when due, but rather the concrete present right, to wit, the right to be paid at the time for actual payment. That latter right has arisen since the decedent's death. Its arising and its disposition leave untouched the general right which the decedent had and which persists. The bond still bears interest. The land is still at rental. The stock still may pay dividends. Nothing has been anticipated, nothing sold, nothing disposed of (Pet. Br. 12-13).

Economic realities verify these assertions. Had the executor sold the entire estate at once and reinvested the proceeds, the income from the new investments would have been no part of the taxable estate. Yet the income, whether from old investments or new, is equally the fruit of the new ownership which dates from the date of death.

In the case of interest and rents this is exceedingly simple and plain. The interest is fundamentally pay for the continued detention of the money, and from and after the date of death it has been the money, not of the decedent, but of the executor which has

been detained. The rent is fundamentally a payment for the continued use and occupation of the land, and from and after the date of death it has been the land, not of the decedent, but of the devisees or heirs that has been used and occupied.

The case of dividends is somewhat more complex, on the one hand because the general right to receive dividends "if, as and when" is more remote than the promise to pay interest or rents at specified intervals, and on the other hand because the rights inhering in the general ownership of the stock do not call for any clear allocation of dividends declared as being against the earnings of any particular period. But the same fundamental consideration is present, namely, the continued corporate use of those assets of which the executor is now fundamentally a co-owner with the other stockholders. And the difficulty, if it be a difficulty, is easily resolved by treating the ordinary dividend for estate tax purposes in a way which corresponds to the manner in which the dividend is conversely treated for income tax purposes. Thus, consistency is achieved as between the estate tax and income tax laws, and the Government is no more unfairly treated with respect to the estate tax situation than is the stockholder with respect to he income tax situation (Pet. Br. 16-20).

We therefore sum up what we have to say with respect to the meaning of "property" and with respect to whether the executor has "disposed of" any property which the decedent possessed at his death, in this wise: The direct and immediate obligation to pay the interest, rent or dividend is not "property" in existence at death, but on the contrary, arises after death and corresponds in economic reality to the considerations currently moving from the present owners of the property. On the other hand, the right which inhered in the arrangements made by the decedent

is not being disposed of in any real sense when the interest, rent or dividends are received; there is merely fulfillment, and if the fulfillment in the case of the loan or the lease brings nearer the date of the termination of the loan or the lease, and hence of the termination of such benefits (or detriments) as the existence of the loan or the lease may be thought to confer, this fulfillment also brings equally nearer the date when the money will be restored to its owner and the land will revert, free once more for the making of new arrangements to develop its productivity. These two elements of value or detriment cancel each other, and the income is left to be, as it truly is, the fruit of the investment as it has gone on in the hands of its new owner subsequent to the date of death.

II. The test of "accessibility" or "availability" is both fallacious and unsupported by the statute.

The intent of the statute was to afford relief against the diminution, during the year, of the value of the property which the decedent owned. This has its relationship to the question of what is available to the executor at the end of the year, but the relationship is imperfect. Even the Government must concede that the income resulting during the year from new leases made by the executor, and as well the ordinary income of new investments, and realized or unrealized increases in the value thereof, will not be includible in the gross estate, as the measure of value of a "right", even though they too are "available". Also, when the optional valuation is not used, the income resulting during the year from investments made by the decedent is not included in the gross estate as the measure of value of a "right", though

it is available* in this case also. The introduction of the alleged test of "availability" into the determination of the issue when the optional valuation is used is a gratuitous attempt to diminish the relief afforded, by the application of a criterion which in no other aspects of the administration of the law has ever become significant.

The Government contends that the inclusion of a sum equal to the income is necessary to limit the boundaries of the relief to true relief (Res. Br. 45-47). A case is put in which "an estate would actually have more at the end of the one-year period, because of income receipts and accruals, than it had at the date of death, despite a decline in market values", and such a case is said to "present the anomaly of an extension of tax relief to a taxpayer whose ability to pay the estate tax had actually been increased" (Res. Br. 47). The fallacy of this contention is that the Government is ignoring the fact that the estate would always have had the first year's income available, whether there were shrinkage or not, and whether there were an optional valuation or not. The extent to which the distributable estate is diminished by shrinkages in market value which occurred during the year is properly determined by comparing the situation existing at the end of the year with that which would have existed at the end of the year had prices not gone down. If the market value of the assets drops $50,000 during the year, there is a shinkage of $50,000, no matter how much income is received, for the income would have been received in either case.

The further obvious answer is that, under the stat-

---

* We are now using "available" in the sense in which it is used in the respondent's brief, as meaning "available for distribution" (Res. Br. 45). Such income is not "available" or "accessible" for the purpose of paying the estate tax. (See Int. Rev. Code §827(a); *Matter of Andrus*, 169 Misc. (N. Y.) 740.)

ute, an estate which, subsequent to death and during the optional year, disposes of its assets at a loss from the date of death, and then makes large gains on new investments, leaving the estate, at the end of the optional year, larger than as at the date of death, will still be entitled to the relief afforded by the statute, by being taxed only upon the value at which the assets were disposed of, and not upon the value either as at the date of death or as it may actually exist at the end of the year, inclusive of its realized or unrealized profits from such new investments.

The truth of the matter is that the Commissioner is troubled about a case in which, he imagines, something will be done by the executor to change the income. He is worried about the imaginary case of an executor who would have received a certain amount of income had there been no optional valuation, but who takes steps to cause the income to be greater because he perceives a benefit to flow from that course in view of the optional valuation. The Commissioner thus unnecessarily seeks to sacrifice the relief of all ordinary cases, in order to avoid abuse of the relief in an extraordinary case which he fears Congress has not guarded against.

III. The Regulation is not needed to prevent "tax avoidance", for the statute, in the light of practical considerations, is adequate to this end.

This brings us to what we deem to be the core of the case which the Government is really litigating. It is summed up at page 6 of respondent's brief. It is that "petitioner's position would allow executors in many cases to write a large part of their own tax bill by the simple device of selling the coupons attached to decedent's bonds, or making an assignment of rents due in the future under a lease, or causing

a corporation in which the decedent owns stock to declare extraordinary dividends." This, it is said that Congress did not intend (Res. Br. 6).

Thus it is asserted that, to close an avenue of tax avoidance alleged to exist in some cases, and which it is said that Congress did not intend, the relief of all taxpayers (which it is clear that Congress did intend) should be abridged by a construction of the statute which finds, as we contend, no support in the legislative history, and which is sought to be drawn within the meaning of the express words of the statute only by an attenuated analysis of the concept of "property" and a remote construction of the term "disposition".

This amounts to legislation, not interpretation through regulation, and we deny its right to prevail even if the evils were as imagined. Actually, however, they are grossly exaggerated.

The supposed cases of selling off coupons in advance, or of making an assignment of future rents, may be dealt with so easily as to afford no problem at all. Unlike the collection of ordinary interest or rents as due, such transactions operate to affect adversely the value of the basic property. The right to the return of the money loaned then stands divorced from the right to receive the pay for its detention for a period not yet ensued; the right to have the land revert stands separate from the right to be compensated for its use as the use occurs. We cannot imagine any court having difficulty with holding that such anticipation constitutes a disposition of a part of what the decedent owned, for such anticipation leaves to be valued at the optional date, one year from death, an asset fundamentally altered from that which the decedent owned at death. There has been amputated from the property its capacity to earn for its owners. The bond stands curtailed and is unmarketable. The rever-

sion stands subject to the lease, but without the benefit of the rents reserved.

It is not for the prospect of such futile "avoidances" as these that the court should deprive all taxpayers of a portion of the relief intended.

The case of dividends, however, may require more consideration. In the first place, the great bulk of stockholders have no such control over the corporations in which they have investments as would enable their executors to vary the flow of dividends for tax purposes. In the second place, most stockholders who are so situated as to have that power, are probably also so situated, for business reasons, that it would be impracticable for their executors to do so. This will be true of businesses which have their surpluses largely invested in plant or inventories against current or possible future needs. Thirdly, in the case of personal holding companies, which is the case about which the Commissioner is really worrying (Res. Br. 40), the current level of income tax rates bears such a relationship to the current level of estate tax rates as to be a tremendous deterrent to the making of such extraordinary distributions. The larger the amount to be distributed, the larger the deterrent will be found to be.

Only when these considerations have been exhausted do we need to come to consider whether a distinction may be drawn between "ordinary" and "extraordinary" dividends, for the purpose of predicting the judicial method of striking down such imagined cases of "avoidance" (*Cf.* Res. Br. 40-41). We do not deem it necessary to embark upon this discussion, although reasonable means can easily be found within the framework of the statute to control even this situation, having in mind the extent to which, both by statute and decision, it has been found possible to prevent the effectuation of tax consequences through the manipulation of corporate structure.

We conclude, then, that the Commissioner's fears are largely groundless, and we suspect that they are put forward merely to implement the desire, implicit in the Regulation, to diminish in all cases the relief afforded by the optional valuation.

IV. Incongruities inherent in the regulation and in the respondent's argument in its defense demonstrate its lack of foundation in the statute; similar suggestions of the respondent are without merit.

References to specific incongruities which flow from the Regulation and which are implicit in its operation are, of course, valuable only in so far as they have any tendency to demonstrate whether or not Congress intended to tax the interim income, and that is the sole basis upon which the suggestions of the petitioner on this score are offered. We respectfully submit that such instances as have been pointed out by the petitioner have not been met in the least iota; and that similar examples attempted to be offered by the respondent hold no water whatever.

It is quite obvious, we think, that crops grown after death upon land owned by a decedent, and the offspring conceived or coming into being after a decedent's death of livestock owned by him, arise from the capital asset in quite the same sense as does the dividend, for example, arise from the share of corporate stock owned by a decedent. However, the Commissioner, faced with the patent impossibility of applying the theory of the Regulation and the argument offered to support it to such types of income, sidesteps the issue by saying merely that they are not mentioned in the Regulation, and that information has been received from the Bureau of Internal Revenue that it is not its policy or practice to include crops planted after the date of death, or livestock born after that date (Res. Br. 53). Even in this

description of the practice, nothing is said about crops planted before the date of death and coming to fruition thereafter, so that even the Regulation and the practice together remain an incomplete exposition of what the Commissioner conceives to be the Congressional intent. Moreover, we respectfully submit that the respondent's answer that crops and offspring of livestock are not taxed quite begs the issue. If the dividend is "referable" to the shares of corporate stock, then so by all means are the crops and offspring referable to the land and original livestock. The Regulation, failing to go that far, implicitly recognizes this inconsistency, and it is no answer whatever to say that crops and offspring of livestock are not involved in this case.

Similarly, it is no answer to our argument that the fact that the statute did not furnish a definition for the valuation of so-called "income rights", and that therefore the existence of such rights as property to be included in the taxable base was not contemplated (Pet. Br. 30), that the Bureau of Internal Revenue in practice seeks to include only the net income, and to allow the deduction of certain expenses of creating such income (Res. Br. 58). The statute, had it intended that interim income should be taxed, would normally have defined how any "rights" thereto should be valued. It did not. Neither did the Regulation, although adopted more than a year afterwards, this for the simple reason that the Regulation did not seek, as the respondent now contends, to include the value of "income rights", but each specific item of gross income collected. The Bureau of Internal Revenue, subsequent to the adoption of the Regulation, and in actual experience in its administration, finds it necessary to make additional concessions—deduction of costs of producing the income—which find neither basis nor definition either in Regulation or in statute, the estate being remitted to the protection of an al-

leged practice nowhere officially confirmed and admittedly not uniform (Res. Br. 59).*

A further incongruity which we have pointed out as being implicit in the Regulation, *i. e.*, the requirement that there be included in the taxable estate the amount, actual or hypothetical, of rents, interest and dividends upon property transferred in contemplation of death, meets with no suggestion of a reply on the part of the respondent. We respectfully submit that there is no reason for this silence except the simple fact that there is no answer which has any foundation in the statute.

This confusion inherent in the Regulation, and in its enforcement and defense, is not here made the subject of mere complaint. It demonstrates that the Commissioner has not found it possible to apply the theory of the Regulation with uniformity to all kinds of income; that the line of demarcation between its applicability to one kind of income and another is still vague; that the practice is compelled to depart from the Regulation by taxing net instead of gross income, and even this without definition and not uniformly; and that it has not been found practicable even after five years of the statute to make the Regulation

---

* The respondent offers the concession (Res. Br. 58-59) that only the *net* income can be taxed, admitting that the Regulation is silent on this score. The statement is made that the policy of the Bureau is to that effect. A footnote (p. 59) tells us that although there may have been instances to the contrary, these do not reflect the general policy and practice. Compare this with the fact, for example, that in *Estate of William J. Morris, Deceased*, B. T. A. Docket No. 100,851 (submitted but not decided) in the brief filed November 1, 1940 by the General Counsel to the Bureau of Internal Revenue the question presented is stated to be "Whether the amount to be included as income from rentals for the optional valuation period is the gross rentals of $8,845.22 or the net rentals of $2,540.06 after deducting expenses aggregating $6,305.16 incurred in operating the properties?"; and it is specifically contended that the *gross*, and not the *net*, rents are to be included in the taxable estate. A certified copy of this brief has been filed with the Clerk of the Court.

coherent or complete, or its administration uniform. These difficulties stem from and testify to the lack of any chart in the statute, and to the absence of any Congressional intent as respects interim income, to be implemented by regulation. They show that the Regulation gropes blindly in its attempt to legislate, rather than interpret.

The respondent, having for the most part endeavored to concede himself out of the difficulties which we have propounded, mentions three instances of alleged inconsistencies or incongruities said to be inherent in the petitioner's construction, and which apparently he thinks are such that they reflect Congressional intent that the interim income be included. These, we think, are quite easily disposed of, and are of no weight in the scale.

The first refers to "an illogical distinction between increase in the value of estates due to accumulated corporate earnings, which are reflected in an increased value of the stock, and those due to distributed corporate earnings" (Res. Br. 55). This argument is belied by common experience, and also by the decision of this court in *Lynch* v. *Hornby*, 247 U. S. 339. The withholding of distribution of corporate earnings in the form of dividends is at least as likely to decrease the value of corporate shares at the optional valuation date as to increase it. The "illogical distinction" has, therefore, no basis in fact.

Next, it is suggested by the respondent that the failure to collect coupons attached to a bond would cause the bond to be valued at the end of the year for more than would have been the case had the coupons been detached; that the bond would then be included at the increased value at the optional date; and that therefore the coupons should be similarly valued if collected in order to avoid any irrational distinction. This ignores the rule in income taxes that a taxpayer, even when on a cash basis, cannot

avoid the inclusion of the interest in his taxable income by the device of refraining from collecting the coupons, which are treated as constructively received. Correspondingly, in the estate tax case, the value of the matured but uncollected coupons should not be included in the value of the bond at the optional date, and there is no distinction to be obviated.

Petitioner is particularly invited to comment on the treatment to be accorded United States Savings Bonds (Res. Br., pp. 28-29). It is said to be incongruous that these bonds, which *accrue* their interest instead of *paying* it, would be included at the end of the year at their then value, as increased by the passage of time, while under the petitioner's construction interest currently payable and collected on income-paying bonds would not be so included. The answer to the suggested dilemma is that it does not exist. There should simply be deducted from the value of the savings bonds at the end of the year such sums as represent the increase in value during the year, either in simple recognition of the economic reality that the increase is but a substitute for interest, or as a direct application of that portion of the optional valuation statute which requires the elimination of the difference "due to mere lapse of time". Even were this not the correct solution, the instance or illustration of a single unusual type of security which would not be treated equally with others has no tendency to reflect a Congressional intent in the statute to tax future income.

Conclusion.

The assertion is made (Res. Br. 50-51) that there is "a presumption that the legislative authority does not intend to abandon any source of revenue unless that intention be clearly expressed." Hence, it is

said that "anyone claiming favored treatment must bear the burden of showing his claim comes strictly within the statute" (Res. Br. 5). The first words that we have quoted are particularly inapt in view of the fact that the interim income has never been a source of estate taxes, but is now sought to be reached for the first time.* Furthermore, if intellectual assent be given to this alleged "presumption", there is nothing left to the oft-repeated rule for construing tax statutes in favor of the taxpayer. It may be that this rule is on the road toward abrogation, but it will be a strange thing indeed if the abrogation comes the first time in the construction of a provision affirmatively intended to give relief. As to the second quotation, we have already pointed out in our main brief that the optional valuation does not accord "favored treatment" in the sense of treating one taxpayer more kindly than another. The only "favored treatment" accorded is granted to all taxpayers similarly situated, as between themselves and the Government, and the according of this treatment is the very object of the statute. No presumption, therefore, can be invoked to attribute to the respondent's arguments more weight than they intrinsically deserve.

We submit that the receipt of income by the executor does not dispose of property owned by the decedent at his death in any realistic or relevant sense; that the test of "accessibility" or "availability" is foreign to the statute; that the Government's fears of tax avoidance are fanciful and remote, and at best are but insignificant in proportion to the proposed dimi-

* Compare this also with the remarkable assertion (Res. Br. 49) that a decision for the petitioner in this case will result in a "windfall" to the taxpayers, when in reality they are only awaiting, with legitimate expectation, the deferred installment of the relief plainly intended by Congress and up to the present withheld only by the Regulation.

nution of relief to all taxpayers; and that the incongruities and confusions inherent in the Regulation and in the argument offered in its defense demonstrate its lack of foundation in the statute.

Respectfully submitted,

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:

HERBERT H. MAASS,
DAVID J. LEVY,
of New York, N. Y.

MELVILLE F. WESTON,
of Boston, Mass.

January, 1941.